(12)

IN THE

Supreme Court of the United States

October Term, 1943.

No. 630

EDWARD G. BUDD MANUFACTURING COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, EDWARD G. BUDD MANUFACTURING COMPANY, (hereinafter called the Company), prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit, refusing to annul and ordering the enforcement of an order by the National Labor Relations Board (hereinafter called the Board). Said order required the Company to deny further recognition to Employees Representation Association (intervener in said case, hereinafter called the Association), which since March, 1934, has been recognized as the bargaining representative for all Petitioner's employees, and requiring Petitioner to reinstate two discharged employees with back pay.

Opinions Below.

The original opinion of the Circuit Court of Appeals (R. 1516a) is combined in 138 F. 2d 86 with the Court's supplemental opinion correcting the original opinion and denying petition for rehearing (R. 1539a), which latter opinion is not separately printed in the Federal Reporter. The findings of fact, conclusions of law and order of the Board (R. 1094a-1128a) are reported in 41 N. L. R. B. 872.

Jurisdiction.

The original opinion of the Circuit Court of Appeals was filed September 7, 1943; its supplemental opinion correcting that opinion and denying rehearing was filed October 25, 1943; its decree was entered on November 6, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

Questions Presented.

1. Whether there is substantial evidence to support the finding of the Board that the Company dominated, interfered with, and supported a labor organization of its employees, known as Employees Representation Association, in violation of the National Labor Relations Act (hereinafter referred to as the Act).

2. Whether, on this record, the Board was justified in ordering the disestablishment of the Association.

Questions subsidiary to the above are:

(a) Whether the assistance found to have been accorded by the Company to its employees to enable them,

on their own initiative, at their express request and prior to the Act, to choose representatives and to form an association for collective bargaining, so tainted the Association thus formed and chosen by them, as to render unlawful its continued recognition by the Company after the passage of the Wagner Act in 1935;

(b) Whether elections held in March, 1934, at the instance of and under directions prescribed by General Johnson, Director of the National Industrial Recovery Board, and of William H. Davis, Director of the Compliance Board thereof, between the Association formed by the employees and the Local of the American Federation of Labor, at which the employees voted in favor of the printed Plan which had been formulated by their representatives, removed any possible effect of the Company's prior assistance in the formation of the Association thus chosen by its employees;

(c) Whether facilities accorded by the Company to the Association subsequent to 1935, pursuant to and as a part of the collective bargaining agreements entered into with the Association as the accredited bargaining agent of the employees, constitute support prohibited by the Act.

3. Whether there is substantial evidence to support the finding of the Board that the Company discharged two of its employees in 1941 because of their membership and activity in the C. I. O.

Statutes Involved.

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix.

Statement.

The following is a concise summary of the undisputed facts on which the Board's disestablishment and reinstatement order was based:

In the fall of 1933, following the passage of the National Industrial Recovery Act of June 6, 1933, some of Petitioner's employees desired to form a labor organization for collective bargaining with the Company. Having been refused a charter by the American Federation of Labor, they decided to form an organization of their own (restricted to Petitioner's employees) and requested representatives of management to assist them in drawing up a plan of organization (modelled on those in effect in other automobile plants with which they were familiar) and in holding an election for representatives. Accordingly, pursuant to the employees' request and with the active cooperation and approval of their fellow-employee and spokesman Alminde, the management representatives drew up and had printed a plan of the type requested, and arranged for an election of 19 representatives, the Company paying the expense of printing the plan and holding the election. Following their election on September 7, 1933, the original 19 representatives organized, and they and their successors, all of whom were elected by secret ballot in admittedly fair elections, have bargained actively with the Company ever since.

There is no finding by the Board or by the Court and no testimony that the Company in any way coerced or *actually* dominated the employees in connection with the preparation of the plan or the conduct of the election; merely that the Company adopted a "most cooperative attitude" to them, "as was to be expected," its attitude

"being one of friendly interest," to enable them to exercise the right of self-organization and of collective bargaining through their selected representatives, which the N. I. R. A. accorded them. All that the Company did was to assist its employees, at their express request, in forming the kind of organization which they told the employer they wanted to have, and to furnish the assistance incident to the payment of the comparatively trifling expenses of printing the proposed Plan and of holding the election. In this respect this case differs materially from any case heretofore in this Court. While in the Board's opinion it refers to certain statements made by officers of the Company (when the employees' representatives were deliberating on the form of their organization) claimed by the Board to be coercive, these statements were not accompanied by any acts of discrimination or favoritism, and are no different from those which, in the *Virginia Electric Power* case, 314 U. S. 469, this Court held to be within an employer's constitutional right of free speech.

Following the election of representatives, the American Federation of Labor called an ineffective strike at the plant, to which but about 15% of the 5000 employees responded.

None of the employees responsible for or participating in this strike, were discharged or in any way discriminated against for their part in it.

Between November, 1933, and March, 1934, the Employee Representatives independently, without consultation with or advice from the Company, made a thorough revision of the proposed plan, in which revision they were advised and assisted by Wm. H. Davis, Chairman of the N. R.

A. Compliance Board. These changes included the elimination of certain provisions, contained in the originally proposed plan, which accorded management a voice in the Association. As revised by the Representatives and subsequently adopted by the employees, the Plan contained no feature which would have rendered it improper or unlawful had the Wagner Act of 1935 then been in effect.

After the completion of the revision, the revised plan was approved by Mr. Davis and was submitted, in printed form, to the employees. An election was then held under rules prescribed by Mr. Davis, under which the employees were given the choice between four alternatives:

> "1—Self organization through the plan of employee representation as proposed by the nineteen elected employee representatives.
>
> "2—Self organization through the United Automobile Workers Federal Labor Union #18763 of the American Federation of Labor.
>
> "3—Self organization through any other agency that you may designate.
>
> "4—No self organization."[1]

The employees, by a vote of 3152 to 1995, chose the revised plan as proposed by the 19 representatives.[2] The Company, at the employees' request, paid the expense of printing the ballots as well as that of the compensation of

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[1] R. 1271a, 1272a.

[2] In its original opinion the Court below stated that the 1934 plan had never been submitted directly to the rank and file membership for its approval or disapproval. (R. 1523a.) On petition (R. 1528a) the Court corrected this very serious factual error, (R. 1539a) recognizing that the election of March 9, 1934, was between the 1934 Plan as proposed by the Representatives and the A. F. of L.

independent tellers [3] for this election, which was held on Company property, the latter in accordance with Mr. Davis' directions. The Court below says: "We do not doubt that this election was conducted honestly."

Following the election of March 9, 1934, General Johnson, on complaint of the Federation that the 500 strikers had not been permitted to vote, held a second election outside the plant in order to give the Federation an opportunity to demonstrate that it had a majority. It boycotted the election and thereafter left the field to the Employees Representation Association, whose representatives have thereafter been recognized by the Company as the accredited bargaining agency of all its employees.

In connection with the two elections the Company posted notices, in the form prescribed by Mr. Davis and General Johnson, quoting Section 7 (a) of the National Industrial Recovery Act,[4] stating that the employees were

[3] For the Company to pay these expenses in no sense constituted "assistance" or support of the Employees Association, any more than of the A. F. of L. The Company was justified in making this small expenditure necessary to enable it to ascertain what organization, if any, was the accredited bargaining agent of its employees.

[4] "Section 7 (a) of the National Industrial Recovery Act provides:

'(1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing.'"

free to vote in the election without fear of discrimination. (R. pp. 1271a-1272a & 1276a.)

In connection with the second election General Johnson wrote and posted in the plant the following written statement (Rec. 1289a):

> "I think that Mr. Budd has acted in complete good faith; that Mr. Budd has attempted to comply with the law; that the present condition is due to a series of misunderstandings. I believe that there is the employee representation that a majority of the men now desire."

For more than seven years,—from March, 1934, until the filing of the present complaint by the C. I. O.,—the Employees Association and the Company have bargained together, unchallenged by anyone.

This bargaining on behalf of the representatives was so effective that, according to the uncontradicted testimony, the average hourly rate increased during the same period from 55¢ to 92.6¢, and the average annual earnings from $1,092.64 to $1,897.84 (Res. Ex. 25, R. p. 1355a). The annual wages increased from $3,588,213.40 in 1933 to $15,427,512.82 for the first fifty weeks of 1941, whereas the Company's total annual net earnings for the years 1933 to 1940 averaged but $132,832.25, a return of less than ½% on its $27,000,000 invested capital (Res. Exs. 23 & 24, R. pp. 1353a-1354a) and the Company did not declare a dividend on its preferred or common stock subsequent to 1930 (R. p. 783a).

Each year the employees elected their representatives, the Company paying none of the expenses thereof after 1934. The Representatives thereafter made some changes

in their plan, none of which were important. It is not found by the Board or contended that the Revised Plan of 1934 contained any provisions subsequently prohibited by the Wagner Act of July 5, 1935; merely that the Proposed Plan of September, 1933, contained such provisions, all of which were eliminated by the employees, either of their own accord or on Mr. Davis' advice, prior to the March, 1934, election, despite the suggestion by the Company, ignored by the Representatives, that certain of them be retained. (R. 31a, 163a.)

The collective bargaining agreements between the Company and the Association, renewed each year with negotiated changes, contained, in each case, agreements by the Company to accord the Association certain facilities. In addition to the conventional facilities relating to the use of bulletin boards, a place on Company property for meetings and elections, etc.,[5] the agreement with the Association of 1937 and subsequent years provided for a participation by the Association in the receipts of the Employees' Exchange, which provision was relied on both by the Board and by the Court as constituting improper support of the Association by the Company and involves an important question under the Act which has not yet been decided by this Court and which this record presents directly, without complications, as follows:—

Prior to 1931, in order to prevent the indiscriminate sale of inferior candy, cigarettes, etc., in the plant, the Company had granted an exclusive concession to make such

[5] The undisputed testimony showed (Resp. Ex. 39, Rec. p. 1371a) that the grant of such facilities was a normal part of the standard agreements with A. F. of L. and C. I. O.

sales to an association (which was incorporated in 1931), known as the Employees' Exchange, all the profits of which were by its charter devoted to accumulating a fund for making small loans to the employees. While supervisory employees were among the organizers of this Association and its officers, the Company had no possible participation in its profits. In 1937 one of the employee Representatives, who was also a trustee of the Employees Exchange, made the proposition that if the Employees Representation Association be given a share of the profits of the Exchange, it could and would stimulate the sales to an extent ample to justify this concession, and that unless this arrangement was made, the Association would boycott the Exchange. The Exchange agreed to this proposition and the Company acquiesced and continued the concession to the Exchange. The receipts from the Exchange actually increased in accordance with the Representative's assurances, and the Association's share was sufficient to cover the expenses of their elections, etc.

There is no question but that the agreement by the Company to the arrangement relative to the Exchange was part of its collective bargaining with the Association. The first reference to it is in the minutes of the collective bargaining between the Company and the Association in March, 1937, (Resp. Ex. 16, Rec. 1304a) (prior to the *Jones & Laughlin* decision of April 12, 1937). The question is accordingly presented to this Court for the first time as to whether, as part of a collective bargaining agreement between an employer and a labor union, the company may lawfully grant the union a concession to vend merchandise to its employees whereby the expenses of the Association are defrayed in whole or in part from the profits on sales to the employees themselves.

In connection with the reinstatement, with back pay, of the two discharged employees, it is and always has been the Company's position that as to one, Milton Davis, the record contains no testimony whatever to warrant a finding by the Board that the Company knew that Davis was a member of the C. I. O., from which it would follow that the Board was not justified in holding that the reason for Davis' discharge was his membership and activity in the C. I. O., in the face of the Company's positive testimony that he had been deficient in his duties.

As to the other discharged employee, Walter Wiegand, the only testimony in the record from which it could be inferred that the Company knew that Wiegand was a member of the C. I. O. was that quoted by the Court in the passage, which we have italicized, from the next to the last paragraph of the Court's opinion, (R. 1525a) as follows:

> "The petitioner contends that Weigand was discharged because of cumulative grievances against him. But about the time of the discharge it was suspected by some of the representatives that Weigand had joined the complaining CIO union. One of the representatives taxed him with this fact and Weigand offered to bet a hundred dollars that it could not be proved. On July 22, 1941 Weigand did disclose his union membership to the vice-chairman (Rattigan) of the Association and to another representative (Mullen) and apparently tried to persuade them to support the union. Weigand asserts that the next day he with Rattigan and Mullen, were seen talking to CIO organizer Reichwein on a street corner. *The following day, according to Weigand's testimony, Mullen came to Weigand at the plant and stated that Weigand, Rattigan and himself had been seen talking to Reichwein and that he, Mullen, had just had an interview with*

> *Personnel Director McIlvain and Plant Manager Mahan. According to Weigand, Mullen said to him, 'Maybe you didn't get me in a jam.' and 'We were seen down there.'* The following day Weigand was discharged."

Both the Board and the Court thus charged the Company with notice of Wiegand's C. I. O. affiliation solely on an inference from Wiegand's testimony that Mullen (another representative and not a Company supervisor) *had told* Wiegand that Wiegand had got him in a jam, and that he and Wiegand had been seen together.

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred:

1. In holding that the following findings of the Board were supported by substantial evidence and were therefore conclusive under Section 10 (e) and (f) of the Act:

(a) that the Company dominated, interfered with and supported the Association in violation of Section 8 (2) of the Act;

(b) that the disestablishment of the Association will effectuate the policies of the Act;

(c) that the Company discharged Walter Wiegand because of his membership in and activity on behalf of the C. I. O.;

(d) that the Company discharged Milton Davis because of his membership in and activity on behalf of the C. I. O.;

(e) that the reinstatement of said Wiegand and/or Davis with or without back pay will effectuate the policies of the Act.

2. In holding that the principle of the *Newport News* (308 U. S. 241), *Link Belt* (311 U. S. 584), and similar decisions of this Court, requiring a "cleavage" or "wiping of the slate clean" after 1935 in the case of unions admittedly organized and actually dominated by the Company prior to 1935, applies to cases such as the instant case, where there was no actual domination but merely assistance and support furnished prior to 1935 at the employees' express request, which assistance or support was withdrawn prior to the passage of the Wagner Act.

3. In holding that if any such "cleavage" was necessary it was not accomplished by the elections of March 9, and March 20, 1934.

4. In holding that facilities furnished by an employer as the result of collective bargaining and as a part of the collective bargaining agreement to and with a labor organization which constituted the exclusive bargaining agency of its employees, constitute "support" or "assistance" forbidden by the Act.

Reasons for the Granting of the Writ.

The Circuit Court of Appeals has in sustaining the disestablishment of the Association erroneously decided five important questions of Federal law which have not been but should be settled by this Court. These five questions, covered by the specifications of error above set out, are more fully stated and explained in the following brief.

In sustaining the two discharges the Circuit Court of Appeals has decided a Federal question contrary to the applicable decisions of this Court, and has departed from the accepted and usual course of judicial proceedings.

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Third Circuit, sitting at Philadelphia, Pennsylvania, commanding that Court to certify and to send to this Court on a day certain to be therein named, a full and complete transcript of the record and all proceedings had in this case numbered and entitled on its docket 8054 to the end that this case may be reviewed and determined by this Court; that the said judgment of the United States Circuit Court of Appeals for the Third Circuit may be re-

versed by this Court; and that your Petitioner may have such other and further relief in the premises as may seem just and proper.

And your Petitioner will ever pray, etc.

EDWARD G. BUDD MANUFACTURING COMPANY,
Petitioner,

By HENRY S. DRINKER,
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Philadelphia 2, Pa.,
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THE FIVE NEW AND IMPORTANT FEDERAL QUESTIONS HERE PRESENTED.

I.

Whether, Where Prior to 1935 Employees, on Their Own Initiative, Have Organized a Labor Organization Restricted to the Company's Employees, Which Has Not Been Dominated by the Company But in the Organization of Which It Furnished Assistance at the Express Request of the Employees, the Same "Cleavage" Is Required to "Wipe the Slate Clean" as in the Case of a Union Admittedly Initiated and Dominated by the Company.

A number of disestablishment cases have come to this Court involving "inside" unions, which had been initiated, organized and dominated by the employer prior to the passage of the Wagner Act in 1935, and in which the Board was sustained in holding that such domination persisted after 1935 in the absence of proof that its effect was nullified and dissipated by subsequent and unequivocal acts on the part of the employer, which "wipe the slate clean" by effecting a distinct cleavage in the minds of the employees between the old organization and the new one.

In each of these cases the Association, prior to 1935, had been admittedly the creature of the company and dominated by it.

In the first *Greyhound* case, "before the enactment of the National Labor Relations Act, respondents . . . initiated a project for their organization under company

domination";[6] in the second, respondent, following the organization of the Association in 1933 "continuously interfered with and dominated the internal administration of the Association."[7]

In the *Newport News* case, the Representation Plan was organized in 1927 and continued to operate for ten years with an equal number of employee and management representatives whose every decision "was dependent upon approval by respondent's president."[8] Even under the Revised Plan of 1937, the action of the Employee's Representative Committee "shall be final and become effective upon agreement by the company,"[9] and the plan could not be amended if the company disapproved of the amendment.[10] The respondent in that case conceded that the plan, prior to its revision in 1937, conflicted with the provisions of the Wagner Act,[11] during which period the plan had been clearly dominated by the company.[12]

In the *Falk* case "shortly after the passage of the National Industrial Recovery Act in 1933 (48 Stat. 195, 198), respondent brought into being a company dominated union of its employees called the 'Works Council' which functioned under company control until April, 1937."[13]

In the *Link-Belt* case, from 1933 down to the date (April 12, 1937), when the *Jones and Laughlin* case was decided by this Court, "the employer, Link-Belt Co. had

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[6] 303 U. S. 261, 268.
[7] 203 U. S. 272, 273; see also p. 274.
[8] 308 U. S. 241, 246.
[9] Id. p. 249.
[10] Id. p. 247.
[11] Id. p. 249.
[12] See id. p. 251.
[13] 308 U. S. 453, 460.

maintained a company union," apparently continuing to recognize it even after the passage of the Act of 1935 and even though under the Act it was concededly an improper bargaining unit.[14] Although in that case it appeared that the independent union which in April, 1937, succeeded the company union was organized at the instance of the employees, it was apparently conceded that the company union of 1933 was both organized and maintained by the company.

In the *Westinghouse* case,[15] where this Court affirmed a disestablishment order on the authority of the *Newport News* and *Link-Belt* cases, the plan had been organized by the company in 1933 and operated under company domination for four years, when it was "revised" by a joint committee of men and management, still containing a provision whereby the company could remove a Representative by discharging or transferring him (see 112 F. (2d) 657, 659).

In the *Automotive Machine*[16] case, where this Court reversed the Circuit Court of Appeals for the Seventh Circuit, per Curiam, and sustained the Board's disestablishment order on the authority of the *Link-Belt* and *Westinghouse* cases, the Association was not formed until 1937 and then was established by means of the important gratuitous, unsolicited and effective assistance of the company.

Finally, in the *Southern Bell Telephone & Telegraph* case[17] this Court expressly stated that "the Association prior to the passage of the National Labor Relations Act

[14] 311 U. S. 584, 586.
[15] 312 U. S. 660.
[16] 315 U. S. 282.
[17] 63 S. Ct. 905, 912.

in 1935 was obviously a company dominated and supported union."

In all of these cases, therefore, the pre-1935 company union was initiated, organized and actually dominated by the company both before and for two years after the passage of the Act of 1935, and for at least four years prior to the reorganization of each of the unions following the *Jones & Laughlin* decision on April 12, 1937. The case at bar is the first in which the Board has been sustained in requiring the same sort of cleavage where there has been no actual domination prior to 1935, but merely the furnishing of facilities at the employees' express request, in order to enable them to obtain the rights guaranteed them by the Acts of 1933 and 1935.

Obviously where an Association is the mere creature of the company which admittedly has long dominated its activities, this impression of domination would naturally persist unless the employer did something very positive, unequivocal and convincing to dispel the long-standing impression of favoritism. Where, however, all that the company has done is to cooperate with its employees in an attitude of "friendly interest" in furnishing facilities to enable them to hold an election of representatives, (which, at the time, was not unlawful) there is no long-standing impression of dominance to be dispelled. If, prior to the passage of the Act of 1935, such assistance is permanently discontinued, and thereafter the company accords the union no support except as the result of collective bargaining, nothing further is necessary.

II.

How Far an Honest Election, Held in 1934 at the Instance of and Under Directions Prescribed by the Then Director if the N. I. R. A. in Which the Employees, in Fair Election, by Secret Ballot, Chose Their Own Organization as Against the A. F. of L. Local, Followed by Such Director's Written Approval of the Employees Association as Constituting "the Employee Representation That a Majority of the Men Now Desire," Justified the Company in Thereafter Thus Recognizing Such Association, Irrespective of Any Assistance Accorded It, at the Request of the Employees, Prior to Such Election.

There has been no disestablishment case in this Court where, as here, the disestablished association was chosen by the employees prior to 1935 in an honest election, with the A. F. of L. or C. I. O. as an active candidate on the ballot, conducted at the suggestion of the Government officials responsible for administering the National Industrial Recovery Act, under regulations and with notices to the employees and posted notices by the employer as prescribed by such officials.

In the *Newport News* case, the vote taken by the employees was *ex parte*, consisting merely of the election of representatives, with no outside union contesting and hence no opportunity of any other choice.

In the *Westinghouse* case there was "an election under the auspices of disinterested outside persons" at which a large proportion of the voters favored the new "Independent" over the A. F. of L. and C. I. O., but at this election only 1015 of the 2300 employees actually voted. Nor did it appear that in connection with this election the Westing-

house Company had posted notices disclaiming discrimination. In the case at bar the election of March 9, 1934, was held at the suggestion and under regulations prescribed by Wm. H. Davis, Compliance Director of the N. I. R. A. after a spirited contest between the employees association of the local of the A. F. of L., the ballot giving the voters choice between the four alternatives specified above (p. 6 hereof).

3152 employees voted for the Association and but 1995 for the A. F. of L. In connection with this election the Company posted notices in the form prescribed by Mr. Davis, advising the employees of their rights under the N. R. A. and guaranteeing them "perfect freedom of action." As a result of it, General Johnson, the director of N. R. A., posted a statement as follows:

> "I think that Mr. Budd has acted in complete good faith; that Mr. Budd has attempted to comply with the law; that the present condition is due to a series of misunderstandings. I believe that there is the employee representation that a majority of the men now desire." (1289a.)

In the *Telephone* case the "election" on which the company relied as validating the admittedly unlawful association was *ex parte*, with no other candidate in the field, was not secret and was conducted by mail by the employees themselves. In the case at bar the election was held pursuant to instructions by the officers of the N. R. A. and was a culmination of an intensive drive by the American Federation of Labor.

III.

Whether Facilities Furnished, by an Employer After 1935, in Good Faith, as the Result and as a Part of Its Bona Fide Collective Bargaining With a Labor Organization Thus Recognized as the Accredited Bargaining Agency of All Its Employees, Constitute the Contribution of "Financial or Other Support" to It Prohibited by Section 8 (2) of the Act.

Under the Act there is obviously an important difference between support or facilities *gratuitously* furnished by an employer to its employees for the purpose of enabling them to form an association favored by the employer, and facilities furnished at the *express request* of the employees, to assist them in electing bargaining representatives in the precise manner which they desire and to enable them to secure the rights given them by the statute. There is also a clear distinction between the *gratuitous* furnishing of support and facilities in furtherance of the *formation* of an association (such as appeared in the *Automotive* case, see 13 N. L. R. B. 343) and the furnishing of facilities on the insistence of an employees' association already recognized as the authorized bargaining agent for all the employees and as a part of the collective bargain entered into with them. This distinction is clearly presented on the present record but was ignored by the Board and the Court. Its recognition is most important in the interpretation and administration of this Act. This is the first case in which the question has been squarely presented to this Court. That the Act must necessarily contemplate a distinction between facilities and support *gratuitously* furnished the employees prior to their organization, and that subsequently

furnished as *part of the collective bargaining agreement* is evident when we consider that the whole basis on which every labor union exists is by the concessions which, through its collective effectiveness, it exacts from the employer. This, in fact, is the sole justification for the legality of the check-off (which, unlike the closed shop, is not specifically provided for in the Act), this being the most obvious item of "support" direct to the union. Similarly, as this Record shows, (see Resp. Ex. 39, R. 1371a) the standard union contracts provide for the use by the union of Company bulletin boards, for special seniority for union officers, for meetings on Company property (items II & III, Rec. pp. 1371-2a) and similar facilities.

It is respectfully submitted that this problem is eminently one on which both the Board and the lower Courts require enlightenment from this Court.

IV.

Whether an Employer Who, Since Prior to 1933, Had Granted a Vending Concession Within Its Plant to a Non-profit Corporation (Whose Funds Were by Its Charter Devoted Solely to the Welfare of the Employees), May, Without Violating the Act, Continue Such Concession From March, 1937, With Knowledge That the Concessionaire Corporation Had Agreed With the Employees Association to Give the Latter a Part of the Profits From the Concession in Consideration of the Association's Stimulation of Sales.

The fourth important question first presented to this Court by the present record is whether an employer who, in good faith, has recognized a labor organization as ex-

clusive bargaining agent for its employees may, as an essential part of the collective bargain demanded by the employees, agree that the Association may have a participation in a vending concession within the plant, in consideration of the Association's stimulation of sales to its employees, whereby the Association, without expense to the Company, may be partially supported from the profits on sales to its own members.

In the case at bar, the Employees' exchange, to which the vending concession shared by the Association was granted by the Company, had been organized long prior to 1933 as a non-profit corporation, all of whose funds were devoted, according to its charter, to the welfare of the employees. This is not a case where the Company invented and put into effect a concession for the benefit of an Association initiated and supported by it, as a device to get around the prohibitions of the Act. When in March, 1937, this Company acquiesced in the Association's having an interest in the concession, it was after demand for this by the Representative of a Union with which the Company had been bargaining in good faith for three years, with no other organization in the field, and none to appear for four years more.

V.

How Far, Under Present War Conditions, Does the Effectuation of the Policies of the Act Require the Disestablishment at This Time of This Association?

In *Southern Steamship Co. v. N. L. R. B.*, 316 U. S. 31, this Court pointed out that, in administering the provision of Section 10 (c) of the Act authorizing the Board to make such affirmative orders as will effectuate the poli-

cies of the Act, there are other Acts of Congress which the Board must consider in addition to the Wagner Act, one of these other Acts being that forbidding mutiny on ships, which in that case the Board had ignored. When the Board issued its order in the case at bar, disestablishing this union which had apparently satisfied these employees for eight years, there were other Acts of Congress which the Board should have considered, Acts designed to secure a maximum production of the war materials to which the entire plant of this Company is exclusively devoted.

Since the issue of the order in this case, and while the case was pending in the Circuit Court of Appeals, Congress inserted as a rider to the Appropriation Act of July 12, 1943, the provision that no part of the funds appropriated to the Board should be used in any way in connection with a complaint case arising over an agreement between management and labor which had been in existence for three months or longer without complaint being filed.[18] When this provision was being debated in Congress, Senator McKellar said of it: "The purpose of this provision is to stabilize labor relations" (see 13 Labor Relations Reporter, page 239).

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[18] Public Law 135:

"No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement between management and labor which has been in existence for three months or longer without complaint being filed: Provided, That, hereafter, notice of such agreement shall have been posted in the plant affected for said period of three months, said notice, containing information as to the location at an accessible place of such agreement where said agreement shall be open for inspection by an interested person."

While, of course, this proviso is not directly applicable to the present case, since the complaint was filed by the C. I. O. in 1941, (seven years after the original collective bargaining agreement between the Company and the Association), nevertheless, the proviso constitutes a clear declaration of Congress that, at this time of stress, the Wagner Act is not to be so enforced as to disturb labor relations. It is difficult to imagine how anything could create a greater labor disturbance in the Budd plant than to abolish this organization on which now for nine years these men have relied as their authorized bargaining agent, and to throw the ten thousand (now sixteen thousand) men in this war plant into the turmoil of a labor contest.

THE DISCHARGE CASES.

The cases of Milton Davis and Walter Wiegand in which the Company is found to have discriminated against them on account of their membership in and activity in the C. I. O. present squarely the question as to whether the Board is justified in relying solely on hearsay testimony or on mere unsupported inference for an essential finding.

Unless the Company knew or had reason to know that Wiegand was a member of or active in the C. I. O. there was no basis for the finding that his discharge was for this reason. The only testimony in the record from which this inference could be drawn was Wiegand's hearsay statement that the day before his discharge he had been told by Mullen (another Employee Representative, not a Company supervisor) that he, Wiegand, and Mullen had been seen talking to a union organizer, and that Mullen had accordingly got him "in a jam."

In the case of Milton Davis, there was no substantial testimony that the Company knew that he was a member of or active in the C. I. O. The only testimony on which the Board could have based its finding was Davis' statement that after he was laid off, he distributed union leaflets at the plant gates, but he did not say that he was seen doing this by any Company supervisor, the only names he mentioned being those of the employee Representatives by whose knowledge the Company could not be bound.

The cases of Wiegand and Davis hence present the important question as to whether the Board is justified in relying for an essential finding on hearsay testimony or on testimony legally insufficient to support the finding. While the *dicta* of this Court in *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 229-230, fully support petitioner's position in this case, the question has not been squarely presented for decision, as it is here.

CONCLUSION.

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

HENRY S. DRINKER,
Attorney for Petitioner.

January 1944

APPENDIX.

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C., Title 29, Sec. 151, *et seq.*) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

* * * * * *

SEC. 10. * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named

in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * * *

(f) * * * the findings of the Board as to the facts, if supported by evidence, shall * * * be conclusive.

Rider to the Appropriation Act of July 12, 1943:

Public Law 135:

"No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement between management and labor which has been in existence for three months or longer without complaint being filed: Provided, That, hereafter, notice of such agreement shall have been posted in the plant affected for said period of three months, said notice, containing information as to the location at an accessible place of such agreement where said agreement shall be open for inspection by an interested person."

No. 630

In the Supreme Court of the United States

OCTOBER TERM, 1943

EDWARD G. BUDD MANUFACTURING COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court below (R. 1516–1526, 1539–1540) is reported in 138 F. (2d) 86. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 1094–1128) are reported in 41 N. L. R. B. 872.

JURISDICTION

The decree of the court below (R. 1541–1543) was entered on November 6, 1943. The petition for a writ of certiorari was filed on January 25,

1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether there is substantial evidence to support the finding of the Board that petitioner dominated and interfered with the administration of, and contributed financial and other support to, a labor organization of its employees (known as the Employees Representation Association) in violation of Section 8 (2) and (1) of the Act.

2. Whether the Board abused its discretion in concluding that, in the circumstances of this case, it will effectuate the policies of the Act to require petitioner to withdraw recognition from and completely disestablish the labor organization found to be company-dominated.

3. Whether there is substantial evidence to support the finding of the Board that petitioner discharged two of its employees because of their union membership and activity, thereby violating Section 8 (3) and (1) of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. sec. 151, *et seq.*) are set forth in the Appendix, *infra*, pp. 24–25.

STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order on June 10, 1942 (R. 1094–1128). The facts as found by the Board and as shown by the evidence may be summarized as follows:[1]

In July or August 1933, shortly after passage of the National Industrial Recovery Act,[2] a local of the United Automobile Workers of America, affiliated with the A. F. of L., began to organize petitioner's employees (R. 1098; 24, 43, 429, 727). Shortly thereafter a group of employees in petitioner's shipping department decided to "form an organization of their own" (R. 1098; 150). Speaking for themselves alone, the shipping department employees met with a group of high-ranking management officials on August 24, and requested their cooperation (R. 1098; 151–152, 227–229, 435–437, 438, 608–609, 724). The basis of discussion at this meeting was a copy of an "Employees Representation Plan" then in operation at another plant in the industry; it had been brought to the meeting by Assistant Works Manager Sullivan (R. 1098; 152–153, 610, 722–723). After considering the draft, the shipping-room employees asked the management representatives to revise it in certain respects, to present the revised version to

[1] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

[2] 48 Stat. 195.

the employees generally, and to hold an election to select representatives from the entire plant to consider the proposal (R. 1098–1099; 153–154, 610–611).

Petitioner's Personnel Director McIlvain and Assistant Works Managers Mahan and Sullivan thereupon drew up a typical 1933 Employees' Representation Plan (R. 1099; 156–157, 1133–1142).[3] It gave the management veto power over amendments (R. 1142), the right to attend meetings of employee representatives (R. 1138–1139), and the power to remove a representative by terminating his employment or transferring him from one voting district to another (R. 1136). There was no provision for membership or dues; all non-supervisory employees of 90 days' standing were permitted to participate, and employee representatives were required to be employees of the Company for one year or more (R. 1136).

The Plan was put into effect by petitioner's unilateral action on September 5, 1933, when the management made its "Preliminary Announcement of the Establishing of a Budd Employee Representative Association," distributed copies of its "Proposed Plan" to the employees, and di-

[3] While preparing the Plan, the management officials consulted with Thomas Alminde, leader of the shipping department employees' movement to form an "inside union," but the Plan as a whole was never submitted to Alminde for approval (R. 125, 156–157, 437–438).

rected the latter to select representatives "exclusively of your own group" who "shall immediately organize and adopt a plan to regulate their operations" (R. 1099–1100; 19–20, 55, 157, 611–612, 724, 830, 1130–1142). The nominating election held that day and the final election held two days later on September 7, 1933, which resulted in the election of 19 employee representatives were held on plant premises, all of the expenses being borne by petitioner (R. 1099–1100; 24–25, 56, 157–159, 229, 612). Although petitioner's announcement of September 5 treated establishment of the Plan as conditional on its acceptance by the employees, the Plan was put into effective operation by the management and the employee representatives immediately after the elections, without further action by the employees (R. 1100–1101; 83, 84, 101–102, 160, 212, 223). Officers were elected and joint meetings were held according to its terms (R. 1100–1101; 101–102, 159–161, 612–613, 1138–1140).[4] Efforts by the representatives to amend the Plan were blocked by the management, exercising its veto power, on the ground that it wished to retain a

[4] Before the Board and the court below, petitioner contended that the 1933 Plan was never put into effect and remained at all times no more than a proposal. Rejection of this contention by the Board and the court below (R. 1109, 1520) was clearly warranted (R. 31, 47–48, 83, 84, 160, 162–163, 212, 221, 1144; see also R. 24, 56–57, 98, 102, 196–197, 287, 730). Petitioner does not appear to press it here (Pet. 4).

"guiding hand" in the Association (R. 1101–1102; 31, 613–614, 726–727, 761, 1408–1409, 1413).

While thus placing its full weight behind the Association, which it had organized and established for its employees, petitioner made clear its opposition to any "outside organization" and those "who are doing their utmost to stir up strife within the company" (R. 1102–1103; 1414–1416). Petitioner's treasurer and president issued statements on October 12 and November 9, 1933, respectively, warning against attempts to "mislead the less thoughtful members of our organization," announcing petitioner's desire "that our employees may protect themselves against this mischievous attack," and reminding the employees that "you and we have prevented outside interference in our affairs" (R. 1102–1104; 1143–1153, 1414–1416). An advertisement published by the management on November 15, 1933, contained a scarcely veiled threat to discharge the leaders of the A. F. of L. Union then conducting a strike against petitioner unless they "see their error and become loyal employees" (R. 1104; 35–36, 1154–1156).

In November 1933, petitioner ceased to oppose changes in the Plan, and its revision was undertaken by the representatives elected thereunder (R. 1104–1105; 120–121, 761). Changes were made, after consultation with William H. Davis, chairman of the Compliance Board of the N. R

A., who was then investigating charges against petitioner which had been filed by the A. F. of L. (R. 1104–1105; 116, 118–123, 163–164, 165–168, 768, 836–841). The final revision eliminated all references to management participation in employee activities but repeated verbatim many of the other provisions of the 1933 Plan (R. 1105; 1382–1391, compare with R. 1134–1142).[5] The Plan, as revised, was printed by petitioner and distributed to the employees (R. 75, 124, 163). Arrangements were made for the holding of an election on March 9 by N. R. A. officials to determine whether the employees wanted the Plan as revised, the A. F. of L., any other organization, or "no self-organization" (R. 1105; 170–174, 1269–1274). Although the N. R. A. officials, on March 8, announced a postponement of the election, it was nevertheless held in the plant on March 9 by public accountants whose fees were paid by petitioner (R. 1105; 139–140, 175–179, 231–232, 727–728, 769). The Association, under

[5] In addition, the 1934 Plan retained several provisions which purported to bind the management and express its position with respect to its relations with the employees (R. 1388–1391; compare with R. 1138–1142). See particularly Art. VIII, par. 4 (R. 1390; compare with R. 1141) which reads:

"4. The management of the Company assures the employees that in no case will the presentation of the employee's grievance, in any manner above set forth, react in any way to the disadvantage of the employee, as it is the personal wish of the Management that each employee have complete freedom of action in such matters."

the Plan, polled 3,152 votes to 1,995 for the A. F. of L. (R. 1105; 1275).

Following the election, the Association continued its uninterrupted existence. The representatives elected under Company auspices and at the Company's direction in 1933 continued to meet in the plant and to act upon employee grievances (R. 1105; 287, 730–731, 763–764). Agreements between the Company and these representatives, arrived at in 1933, were continued in effect after March 1934 without renegotiation (R. 1101, 1106; 384–385, 618, 621–622, 762, 764, 765). The Plan, as revised in 1934, was still in effect with minor modifications at the time of the hearing in this case in January 1942 (R. 1105–1106; 1242–1255). In September 1941, petitioner formally announced its recognition of the Association as the exclusive representative of the employees (R. 1107; 1257).

The Association has never held any general membership meetings (R. 1107; 307). It collects no dues (R. 1107; 353). All non-supervisory employees in the plant are treated as members, and no membership records are kept other than lists of those who vote in the elections (R. 1106–1107; 60–61, 307–308, 349–353, 1252).

The Association's expenses have at all times been kept at a minimum by the generous aid which it has received from the management. The initial steps in its formation and revision in 1933 and 1934 were all financed by petitioner (*supra*,

pp. 4–5, 7).[6] Since 1933, all elections of employee representatives have been conducted on company premises (R. 1110, 1111; 109, 297–298, 354, 649–650, 732, 769–770). Until 1936, petitioner paid the cost of these elections (R. 1110; 187, 229, 234, 266–267, 296, 454–455, 649–650, 769–770). All meetings of the employee representatives and their committees have also been held on company time and property (R. 1101, 1106, 1110; 305, 352, 377–378). Until 1937, this use of petitioner's premises was granted rent free (R. 1106; 330–331, 357–358; 618–620, 761–762, 1171–1188). Since November 1933, employee representatives have been paid their basic wage rate for attending to the affairs of the Association during working hours (R. 1101; 384–385, 730–731, 763–764). The "extraordinary leniency" with which petitioner treated the Association representatives was summed up by the court below as follows (R. 1524):

> The testimony shows to what very great lengths the employer went in its parental treatment of the Association and its officers. The petitioner permitted the employee representatives to conduct themselves about as they wished. They left the plant at will whether on personal business or on the business of the Association. Some of them did very little or no work but they received full pay. It is clear that some of them,

[6] As late as February 1934, the Association had no funds whatsoever (R. 124; see also R. 59).

> Walter Weigand for example, were not disciplined because they were representatives. * * *[7]

In 1937, the Association made an arrangement with petitioner which virtually eliminated the necessity for such assistance as the payment of election expenses and the rent-free use of plant premises which had previously been granted. The "Employees' Exchange" was founded by officials of the Company in 1928 and incorporated in 1931 (R. 1106; 899–901, 904, 1189–1193). Pursuant to an arrangement with the management, it sold candy and other items on the plant premises, and devoted the profits of these operations to various welfare services for petitioner's employees (R. 1106; 766, 902–904). In 1937, the Employees' Exchange and the Association agreed that the latter would promote the Exchange's sales and in return the Exchange would give 50 percent or more of its profits to the Association (R. 1106; 908, 1043–1045, 1194–1197). Petitioner gave its consent to this arrangement and, in 1938, became a formal party to a tri-partite agreement which is still in effect (R. 1106; 657, 767–768, 909–910, 1045).[8]

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[7] See R. 375–380, 531, 714, 801, 1049–1050, and p. 11, *infra*.

[8] This arrangement secured to the Association its first regular source of income and netted it $5,000 in 1941 alone (R. 338, 358, 911–912). Both before and after this arrangement was made, the Association's only other method of securing funds was the holding of social affairs (R. 358–359).

The Union[9] which filed the charge in this case began an organizing campaign among petitioner's employees in November 1940 (R. 1107; 7). In July and September 1941, petitioner discharged two employees who, although formerly active in the Association, had become active on behalf of the Union.

Walter Weigand, employed by petitioner in 1936, was elected as a representative in the Association in 1938 and served in that capacity and on various Association committees from that date until his discharge (R. 1114; 530, 540, 542, 1211, 1213, 1226, 1228, 1243). After his original election, Weigand devoted almost all of his working time to Association business and his own personal affairs, doing very little production work (R. 1115, 1117; 535–536). Despite complaints about his absence from work over a period of years by all of his immediate supervisors (R. 1117; 692–697, 709–710, 716–717, 792–798, 801–804, 811–813, 879–880, 884–887), he was retained by petitioner because, since he "was a representative of the men, * * * it wasn't right to discharge him" (R. 1117; 798, 884, 892).

Weigand joined the Union in March 1941 (R. 1115; 544). On July 22, he disclosed his membership to two Association officials, Mullen and Rattigan, and sought to persuade them to sup-

[9] International Union, United Automobile Aircraft & Agricultural Implement Workers of America, affiliated with the C. I. O. (R. 1094; 1, 7).

port the Union (R. 1115; 547). On July 23, these three men conferred with a union organizer on a street corner in Philadelphia (R. 1115; 548–549). On the next day, Mullen told Weigand that he had just come from a conference with Personnel Director McIlvain and Works Manager Mahan, and that they had been seen talking with the union organizer the night before. He accused Weigand of getting him "in a jam" (R. 1115; 549–550). Weigand was discharged when he came to work the next day (R. 1116; 552–553). The reason given on his lay-off slip was "Inattention to duties" (R. 1116; 1265).

Milton T. Davis was first employed by petitioner in 1933 (R. 1121; 494). On September 9, 1941, he was laid off during a reduction in force in his department (R. 1121; 496, 956, 1266). He was told by his foreman at the time that he would be sent for in about 10 days (R. 1121; 523). Davis had joined the Union in July 1941 and had been active on its behalf (R. 1121; 495–496). After his lay-off on September 9, he distributed union leaflets at the plant gates (R. 1121; 501–502). When work resumed in his department about 10 days after his lay-off, Davis was not recalled and his subsequent repeated applications for employment were rejected (R. 1121–1122; 496–498, 499–501), although men who had been laid off in Davis' department were being taken back at this time (R. 1121–1122; 496, 522–523, 957, 1022).

Petitioner contended that Davis was discharged on September 9, rather than laid off, that he had been considered unsatisfactory for 3 years, and that it had merely waited for the first general lay-off to effect his discharge (R. 1122; 957–958, 964–966, 972, 978, 1017–1018). The Board rejected this contention in view of the fact that Davis had not been laid off on the occasion of a general lay-off earlier in 1941 (R. 1122–1123; 967).

On the foregoing findings, the Board concluded that petitioner had dominated and interfered with the administration of the Association and had contributed financial and other support to it in violation of Section 8 (2) of the Act (R. 1111, 1125), that petitioner has discriminated with respect to the hire and tenure of employment of Walter Weigand and Milton T. Davis, thereby discouraging membership in the Union, in violation of Section 8 (3) of the Act (R. 1118, 1123, 1125), and that by the above acts petitioner had interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, thereby violating Section 8 (1) of the Act (R. 1111, 1118, 1123, 1125–1126). The Board ordered petitioner to cease and desist from its unfair labor practices, to cease and desist from giving effect to any contracts between it and the Association, to withdraw recognition from and disestablish the Association as representative of any of its employees

for collective bargaining purposes, to reinstate Weigand and Davis with back pay, and to post appropriate notices (R. 1126–1128).

On September 7, 1943, the court below handed down its opinion enforcing the Board's order without modification (R. 1516–1526). On September 16, 1943, petitioner requested a rehearing and certain modifications of the court's opinion (R. 1527–1535). The court denied the petition for rehearing on October 25, 1943, at the same time modifying its opinion in certain respects (R. 1539–1540). Its decree was issued on November 6, 1943 (R. 1541–1543).[10]

ARGUMENT

1. In attempting to present what it conceives to be novel questions for decision by this Court, petitioner, throughout its Petition and supporting Brief, relies on fundamental assumptions which are at variance with well supported findings of the Board which were upheld by the court below.

Petitioner repeatedly asserts that "There is no finding by the Board or by the Court and no testimony that the Company in any way coerced or *actually* dominated the employees in connection with the preparation of the plan" (Pet. 4, 5, 13, 17, 20). In fact, however, the Board found that petitioner "gave direction" to the movement to form an unaffiliated organization and drew up a

[10] The decree modified Paragraph 2 (d) of the Board's order in a manner not material here (R. 1128, 1543).

Plan which included "provisions for [petitioner's] participation in the affairs of the employees," that the Plan "thus took form and developed according to the desires of" petitioner, that petitioner had a "part in the formation of the bargaining agency," and that petitioner "sponsored" the Association and "launched it among the employees" (R. 1108–1109). Upholding these findings, the court below concluded that "the plan and the Association were in fact sponsored, largely created and supported by the petitioner" (R. 1520). The findings are supported by the record. If the organization of a bargaining mechanism in all its details, including the qualifications of employee representatives (*supra*, pp. 3–5), its unilateral establishment among the employees (*supra*, pp. 4–5), the calling and management of elections of employee representatives (*supra*, pp. 4–5), and the limitation of the employees' choice of representatives "exclusively" to "your own group" (*supra*, p. 5) do not constitute domination of employee activities, then there is no such thing as domination. Moreover, effective domination would appear even if what the court below called petitioner's "cooperative attitude toward the Association" (R. 1520) were alone considered. As the court noted, "The Association could not have continued to exist had the Budd Company withdrawn its support" (R. 1520). In such a situation employer domination is complete.

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Petitioner's repeated assertions that its "assistance" in 1933 was all granted "at the express request of the employees" (Pet. 17, 3, 5, 13, 20) is at best misleading. The Board recognized that the original movement looking to formation of an unaffiliated union came from the shipping department employees and that the latter requested the management's cooperation (R. 1098, 1108). But the movement was limited to the shipping department (R. 227–229, 435, 438, 724) which numbered no more than 85 out of a total of 4,500 employees in the plant (R. 721). Thus, so far as the bulk of the employees were concerned, the Association was entirely the creation of the management. Petitioner's imposition of the Plan and the Association on all of its employees certainly cannot be justified on the ground that it may have accorded with the wishes of a few of them.[11] In any case, not even a request for assistance by a labor organization which represents a majority of the employees can justify wholesale intervention by the employer. Cf. *National Labor Relations Board* v. *Electric Vacuum Cleaner Co., Inc.*, 315 U. S. 685, 694–695.

Petitioner's assertions that the Association which was in existence after the Plan was revised in 1934 was organized by the employees or "by their representatives" (Pet. 3, 17) are likewise

[11] Alminde, treated by petitioner as "spokesman" of the employees (Pet. 4), spoke for the shipping department alone (R. 435, 438). See fn. 3, *supra*, p. 4.

incorrect. The 1934 Plan was prepared by representatives elected at the management's direction and under management-prescribed restrictions (*supra*, pp. 4–5, 6–7). "The reorganization proceeded by revision [of the employer-drawn 1933 plan] rather than by original creation." *National Labor Relations Board* v. *Southern Bell Telephone & Telegraph Co.*, 319 U. S. 50, 56. (See *supra*, p. 7.) The employees elected in 1933 continued in office under the 1934 Plan without even going through the formality of a new election, a fact which "alone established an appearance of continuity between the two" allegedly distinct arrangements. *Westinghouse Electric & Mfg. Co.* v. *National Labor Relations Board*, 112 F. (2d) 657, 659, 660 (C. C. A. 2), affirmed, 312 U. S. 660. Hence, the Board properly found that the Association, after March 1934, was the same organization as that which had been established by petitioner and not an independent creation of the employees (R. 1109).

Petitioner's statement that the revised 1934 Plan contained no provision which would have rendered it unlawful under the Act (Pet. 6, 9) is likewise incorrect. It contained several features which the courts have frequently recognized as indicative of company domination: the absence of a requirement for the payment of dues;[12] the

[12] *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, 245; *National Labor*

provision under which all employees were treated as members, with no arrangement for individual membership or membership records;[13] and the absence until 1937 of any provision for membership meetings.[14]

Petitioner's assertion that all company support was withdrawn before passage of the Act in 1935 (Pet. 13) is inconsistent with the Board's square holding to the contrary (R. 1109, 1110, 1111), upheld by the Court below (R. 1522–1524).

Relations Board v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 269; *American Smelting & Refining Co.* v. *National Labor Relations Board*, 126 F. (2d) 680, 683 (C. C. A. 8); *Colorado Fuel & Iron Corp.* v. *National Labor Relations Board*, 121 F. (2d) 165, 168 (C. C. A. 10); *Bethlehem Steel Co.* v. *National Labor Relations Board*, 120 F. (2d) 641, 645 (App. D. C.); *Bethlehem Shipbuilding Corp.* v. *National Labor Relations Board*, 114 F. (2d) 930, 937 (C. C. A. 1); *National Labor Relations Board* v. *American Manufacturing Co.*, 106 F. (2d) 61, 64 (C. C. A. 2), affirmed as modified, 309 U. S. 629; *Wilson & Co., Inc.*, v. *National Labor Relations Board*, 103 F. (2d) 243, 251 (C. C. A. 8). Cf. *Titan Metal Mfg. Co.* v. *National Labor Relations Board*, 106 F. (2d) 254, 259 (C. C. A. 3), certiorari denied, 308 U. S. 615.

[13] *Bethlehem Steel Co.* v. *National Labor Relations Board*, 120 F. (2d) 641, 645 (App. D. C.); *American Enka Corp.* v. *National Labor Relations Board*, 119 F. (2d) 60, 61 (C. C. A. 4).

[14] *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 269; *American Smelting & Refining Co.* v. *National Labor Relations Board*, 126 F. (2d) 680, 683 (C. C. A. 8); *Colorado Fuel & Iron Corp.* v. *National Labor Relations Board*, 121 F. (2d) 165, 168 (C. C. A. 10); *Bethlehem Steel Co.* v. *National Labor Relations Board*, 120 F. (2d) 641, 645 (App. D. C.); *American Enka Corp.* v. *National Labor Relations Board*, 119 F. (2d) 60, 62 (C. C. A. 4).

Petitioner insists that the generous assistance which it lavished upon the Association was all the result of "collective bargaining" (Pet. 3, 9–10, 14, 23, 24). However, this alleged bargaining was conducted with an organization dominated and supported by the Company, as the Board noted (R. 1109). The first concessions were granted in 1933, even before the events of 1934 which petitioner contends freed the Association from prior dependence on the company (Pet. 21–22), and these concessions were continued in effect thereafter (*supra,* p. 8). Moreover, the "collective bargaining" in question was a sham, consisting in most cases of no more than a request by the Association for a particular kind of assistance and petitioner's prompt granting of the request (see, *e. g.,* R. 649, 657, 762, 770). Finally, petitioner's concessions to the Association went far beyond what any of the contracts required. Thus, the favored position given to the Association representatives (*supra,* pp. 9–10) was in no way justified by the very limited terms of the applicable provision in the working agreements (R. 1255).

With respect to petitioner's interference with and domination and support of the Association, the petition presents no more than the question whether the Board's findings that petitioner violated Section 8 (1) and (2) of the Act are supported by substantial evidence. The evidence reviewed in the Statement above fully supports the Board's findings, and the decision of the court

below upholding those findings is correct. Accordingly, no further review by this Court is warranted.[15]

2. In representing this case as presenting novel, undecided questions, petitioner has adopted an approach which has been repeatedly rejected by this Court. The validity of the Board's findings must be determined on the basis of "the whole congeries of facts." *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 588. The various relevant facts must be considered both by the Board and the reviewing courts "not in isolation but as part of a pattern of events". *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U. S. 533, 539.[16]

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[15] Petitioner's contention that its employees should be removed from the protection of the Act for the duration of the war (Pet. 25–27) is entirely without merit. The importance of maintaining peaceful labor relations is increased rather than diminished in wartime, and the preservation of such relations depends primarily on the right of employees to resort to the Government. Furthermore, a similar contention was rejected by this Court in the *Southern Bell* case (319 U. S. 50) when it reversed the decision of the Circuit Court of Appeals for the Fifth Circuit (129 F. (2d) 410, 415; see also Southern Bell's Brief in this Court, pp. 79–80).

[16] See also *National Labor Relations Board* v. *Southern Bell Telephone & Telegraph Co.*, 319 U. S. 50, 57–58; *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 79; *National Labor Relations Board* v. *Harbison-Walker Refractories Co.*, 135 F. (2d) 837, 838 (C. C. A. 8); *National Labor Relations Board* v. *Precision Castings Co., Inc.*, 130 F. (2d) 639, 641 (C. C. A. 6); *Canyon Corporation* v. *National Labor Relations Board*, 128

Thus, this case does not turn solely on the events of March 1934, "divorced from the events immediately preceding and following" (*International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 78), as petitioner contends (Pet. 17–20). Neither does it present in isolation the question of support granted to a labor organization pursuant to collective bargaining agreements (Pet. 23–25). The court below properly treated the various elements in this case as "symptomatic" of a pattern of events which disclosed illegal restraints upon the employees (R. 1524).

The distinctions which petitioner makes between the instant case and the cases decided by this Court involving company domination (Pet. 17–20) are fallacious not only because they rest on fundamental misconstructions of the record (*supra*, pp. 14–19), but also because they reveal no more than factual differences which do not affect the basic principles of decision. Here, as in *National Labor Relations Board* v. *Southern Bell Telephone & Telegraph Co.*, 319 U. S. 50, 60, "the Association prior to the passage of the National Labor Relations Act in 1935 was obviously a company dominated and supported union." Moreover, petitioner's complete subsidization of the Association after passage of the Act, and particu-

F. (2d) 953, 955 (C. C. A. 8); *National Labor Relations Board* v. *Christian Board of Publication*, 113 F. (2d) 678, 683 (C. C. A. 8).

larly after the Employees' Exchange arrangement was initiated, went far beyond the "minor favors" deemed significant in the *Southern Bell* case (319 U. S. at pp. 57–58). As the court below held (R. 1524), "the decision of the Board to the effect that the Association was and is subject to the petitioner's domination and control is amply supported by the evidence."

In the light of all the foregoing, which discloses that petitioner engaged in the unfair labor practice of dominating and controlling a labor organization (sec. 8 (2)), it was plainly the Board's duty under Section 10 (c) to require petitioner to withdraw recognition from and disestablish the company-dominated Association.

3. The evidence described in the Statement amply supports the Board's findings that petitioner discriminatorily discharged Walter Weigand and Milton T. Davis, in violation of Section 8 (3) and (1) of the Act. Petitioner's contention is that there is insufficient evidence to support the Board's finding that the management had knowledge of the shift in allegiance of the two employees from the Association to the Union (Pet. 11–12, 27–28). But the Board could have inferred such knowledge from nothing more than the sudden change in treatment accorded these employees and petitioner's implausible explanations of its conduct (*supra*, pp. 11–12, 13). Contrary to petitioner's assertion, this question was passed upon by this Court when it held in *National*

Labor Relations Board v. *Link-Belt Co.*, 311 U. S. 584, 602,[17] that—

> The Board was justified in relying on circumstantial evidence of discrimination and was not required to deny relief because there was no direct evidence that the employer knew these men had joined [the Union] and was displeased or wanted to make an example of them.

CONCLUSION

The opinion below is correct and presents no question of general importance. There is no conflict of decisions. The petition should therefore be denied.

Respectfully submitted.

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[17] See also *National Labor Relations Board* v. *Abbott Worsted Mills, Inc.*, 127 F. (2d) 438, 440 (C. C. A. 1); *National Labor Relations Board* v. *Keystone Freight Lines*, 126 F. (2d) 414, 417 (C. C. A. 10); *F. W. Woolworth Co.* v. *National Labor Relations Board*, 121 F. (2d) 658, 660 (C. C. A. 2); *National Labor Relations Board* v. *Entwistle Mfg. Co.*, 120 F. (2d) 532, 535–536 (C. C. A. 4).

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. sec. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer——
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> (2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *
>
> * * * * *
>
> SEC. 10.
>
> * * * * *
>
> (c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and

cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

(f) * * * the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1944

(17)

IN THE

Supreme Court of the United States

October Term, 1943.

No. 630.

EDWARD G. BUDD MANUFACTURING COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

REPLY BY PETITIONER TO BRIEF FOR THE BOARD IN OPPOSITION TO THE WRIT.

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REPLY BY PETITIONER TO BRIEF FOR THE BOARD IN OPPOSITION TO THE WRIT.

The Brief for the Board in Opposition to the Writ, by deftly stretching the Board's primary findings of fact (R. pp. 1098a to 1107a), some more, some less, seeks to make them add up to sufficient to support the Board's conclusions (R. pp. 1107a to 1112a) of actual domination of and effective interference with the Association. To demonstrate the fallacy of the Board's argument would therefore require a detailed analysis of the Board's findings much more lengthy than would be proper in the present reply. Despite the Board's present statements to the contrary, the five important questions specified in the petition for the writ are squarely presented in this case.

To give a few illustrations of how, in the brief filed in opposition, the Board's primary findings have been misconstrued:

On pages 3 and 16 of the Brief in Opposition it is contended that the request by the employees to management to assist them in the preparation of the Proposed Plan was solely for the benefit of the 85 employees in the shipping department, whereas the Board found (R. pp. 1098a to 1099a), basing its finding on the testimony of the Board's witness Alminde (R. pp. 150a to 154a) that at the meeting of August 24th the shipping employees, after discussing the matter amongst themselves in the absence of the management representatives, "requested that the management combine the draft (of the plan in use by another company) with certain ideas expressed by the shippers, present it to the employees, and hold an election to select representatives *from the entire plant* to consider the suggested plan of employee representation."

On page 3, the purported summary of the Board's findings as to Sullivan's reading the plan in effect at another plant is framed to give the impression that Sullivan imposed this plan on the men as the basis of the discus-

sion. The uncontradicted testimony referred to in the Brief in Opposition (R. pp. 152a-153a, 610a, 722a-723a) together with that of Alminde on page 151a, was, however, that *before* the meeting of August 24th, Alminde had told Sullivan "exactly what the men had in mind as regards their desires of organization" (151a); that *at* the meeting Alminde told Sullivan "that we knew similar plans of organization were existent in other parts of the automobile industry," (R. pp. 152a, 220a); and that it was *then* that Sullivan produced the plan, asked if the men wanted to have it read, and on their saying that they did, read it and left it with them when the management representatives retired. (R. pp. 152a-153a.).

Contrary to the inference from pages 4-5 of the Board's Brief, the Proposed Plan was drawn up with frequent discussions with Alminde (R. pp. 1099a; 156a-157a). The Board did not find that anything went into the Proposed Plan except what the men asked to have in it.

The Board contends (p. 4) that the Proposed Plan was put into effect by the Company's "*unilateral*" action on September 5, 1933, providing for the election. This, however, as found by the Board, was the direct result of the employees' request.[1]

On page 5, the Board states: "Efforts by the representatives to amend the Plan were blocked by the management, exercising its veto power, on the ground that it wished to retain a 'guiding hand' in the Association." What the Board found, however, was (R. pp. 1101a to 1103a) that at one of the early meetings with the employee

[1] Contrary to the statement in note 4 on page 5 of the Board's Brief, Petitioner maintains and will argue to this Court that although in the fall of 1933 the Company bargained with the 19 representatives, the Employees Association was not formed until accepted by the employees at the March election. No one but the members can form an association.

representatives, the management expressed a desire to have a "guiding hand" in the association in order that the association might not "do something foolish", and asked that changes in the plan be postponed. Admittedly, however, after November the management representatives made no further suggestions of this nature. Between November and March the employee Representatives thoroughly revised the Proposed Plan and, of their own volition or on the suggestion of William H. Davis, Compliance Director of the N. R. A., eliminated therefrom all provisions giving management any voice whatever in the operation of the association. Any attempted interference by the Company was therefore wholly ineffectual.

The Court's attention is particularly directed to the distinction between the Board's findings of the primary facts on pages 1098a to 1107a of its report and its conclusions from such findings on pages 1107a to 1112a.

Despite the innuendoes of coercion on page 6 of the Brief, the Board does not apparently now dispute our assertion that none of the employees responsible for or participating in the November "strike" by the AFofL Local were discharged or in any way discriminated against by the Company for their part in it.

The Brief stresses, as did the Board and the Court below, the fact that the Company for a time overlooked Wiegand's delinquencies, because he was a representative, as evidence of the Company's "parental treatment" of the Association. This conclusion, however, begs the question at issue by assuming that the Company's leniency was the result of parental solicitude rather than of genuine regard for the wishes of the men and respect for their organization. If Wiegand had been an officer of the CIO or the AFofL, the Company, for fear of being accused of discrimination, would have refrained from discharging him until certain, not only of his guilt, but also of its ability to demonstrate this. A local officer of one of these organ-

izations can normally get away with about four times as much dischargable conduct, and a known member with about twice as much, as a non-union employee. The fact that the Company behaved toward Wiegand as it would have had he been an officer of one of the national unions is relied on as showing that the association was a mere "sham," whereas in reality it showed respect for the association as the genuine representative of the men.

With regard to the Board's finding that the petitioner discharged Wiegand and Davis because of their membership in the CIO, the Board refers to no substantial testimony which would justify the conclusion that the company knew that these men were members of the CIO. Wiegand had concealed this fact, even from his fellow employees, until a day or two before he was discharged. The only testimony relied on as to him was his statement as to what employee representative Mullen (not a company officer or supervisor) had told him; and as to Davis, that after his layoff he had distributed CIO literature at the plant gates (of which the company admittedly had a number), without any testimony, even from Davis himself, that any company supervisor who knew Davis saw him do so.

It is true that the Board in the present case "conclude and find (R. p. 1111a) that since July 5, 1935, the Company dominated and interfered with the administration of the Association and has contributed financial support to it," in the language of the Act. So did the Board find in the case of *N. L. R. B. v. Virginia Electric & Power Co.*, 314 U. S. 469, where this Court, on examination of the Board's primary findings, held that these did not legally justify the Board's conclusion, since the Board had evidently relied on the employer's privileged address and communication. Similarly, in the case at bar, it is the function of the Court both to determine whether the Board's primary findings are supported by substantial evidence, and whether the primary findings, so supported, justify the Board's ultimate conclusion.

While the Board's powers in finding the facts are admittedly very broad, such powers are confined to the findings of actual facts and do not extend to the drawing of legally erroneous conclusions from the findings of fact. Even the Board cannot make 2 and 2 add up to 5.

Respectfully submitted,

HENRY S. DRINKER,
For Petitioner.